United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

75-4220

United States Court of Appeals
FOR THE SECOND CIRCUIT

PITTSTON STEVEDORING CORPORATION and
HOME INSURANCE COMPANY,

Petitioners,

against

FRANK SPATARO,

Respondent,

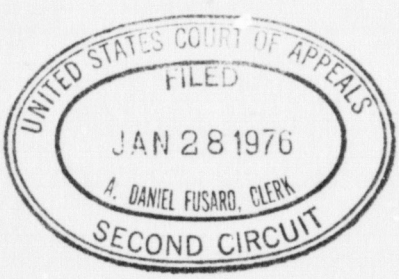
and

DIRECTOR, OFFICE OF WORKMEN'S COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,

Respondent.

ON APPEAL FROM AN ORDER OF THE BENEFITS
REVIEW BOARD U.S.D.L.

BRIEF FOR PETITIONERS



JOSEPH F. MANES
Attorney for Petitioners
11 Park Place
New York, New York

249 Press of Fremont Payne, Inc., 417 Canal St., N. Y.—966—6570

TABLE OF CONTENTS

CASES CITED

Statutes Cited

Miscellaneous

United States Court of Appeals

FOR THE SECOND CIRCUIT

PITTSTON STEVEDORING CORPORATION and
HOME INSURANCE COMPANY,

Petitioners,

against

FRANK SPATARO,

Respondent,

and

DIRECTOR, OFFICE OF WORKMEN'S COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,

Respondent.

BRIEF FOR PETITIONERS

Statement

This is a Petition for Review by Pittston Stevedoring Corporation and Home Insurance Company, from an Order of the Benefits Review Board, United States Department of Labor (hereinafter referred to as the Employer, Carrier and Board respectively), which Order affirmed an Order of Administrative Law Judge Bernstein, which established that the claim of Frank Spataro, Respondent, comes within the purview of the Longshoremen's and Harbor Workers Compensation Act as amended 33 U.S.C. 901., *et seq.*

Questions Presented

1. Is the assumption of jurisdiction and the affording of coverage to the respondent Frank Spataro proper?

Summary of Argument

The Board decision is error in that the Respondent Frank Spataro was not engaged in longshoring operations nor was he entitled to coverage within the meaning of Section 3 Subdivision A of the L.H.W.C.A.

The Board's conclusions of law are contrary to the provisions of the L.H.W.C.A., as well as the intent of Congress as expressed in the deliberations of that body and in the legislative proceedings which culminated in the 1972 amendments to the Act.

Facts

The respondent, Frank Spataro, was engaged on June 28, 1973 in the unloading of palletized cargo enclosed within the body of a truck. (A-19)

His occupational classification was denominated as "Terminal Laborer and Driver." (A-15)

He had been so employed by the employer herein for some three and one half years. (A-15)

On the day in question and for a considerable time prior thereto he was employed at the Marra Bros. Terminal situated on Smith Street in Brooklyn, New York. (A-15)

This terminal is a warehouse which is adjacent to a pier which in turn is partially surrounded by navigable waters. (A-11)

The terminal warehouse has at one end a loading platform. (A-16)

On the day in question a truck owned and operated by Intermodal Trucking had backed up to the loading platform. (A-28)

The respondent, Frank Spataro, entered into the confines of said truck and while attempting to open its doors he was injured. (A-20)

He intended to drive a hi-lo machine into the body of said truck and remove a cargo of coffee then on pallets. (A-16) It was his usual practice to remove any such cargo from a truck and deposit it on the loading platform from which point it was retrieved by another hi-lo machine and placed in the terminal warehouse. (A-16)

The cargo in this instance had been off loaded from the vessel "Monica" on May 25, 1973 at Pier 20, geographically remote from the Marra Bros. Terminal. (A-17, A-33)

Said cargo had been transported by Intermodal Trucking from Pier 20 for storage in the Marra Bros. Terminal. (A-33)

The last previous time that a ship had been off loaded at Marra Bros. Terminal was about half a year prior to the instant accident. (A-24)

The Administrative Law Judge found that the claim fell within the jurisdiction of the Act. (A-3)

He held that the site of injury was one customarily used by an employer in loading and unloading, repairing or building a vessel, and further that the respondent Frank Spataro was engaged in maritime employment as a hi-lo driver. (A-3)

The Board found that the jurisdictional requirements of Section 2(3), (4) and 3(A) of the Act were clearly satisfied. (A-8, 9)

POINT 1

The Board decision is error in that Respondent Frank Spataro was not engaged in longshoring operations nor was he entitled to coverage within the meaning of Section 3 subdivision A of the L.H.W.C.A.

The Board's conclusions of law are contrary to the provisions of the L.H.W.C.A., as well as the intent of Congress as expressed in the deliberations of that body and in the legislative proceedings which culminated in the 1972 amendments to the Act.

The Board decision, affirming that the claim fell within the jurisdiction of the Act, is predicated upon the proposition that the respondent was an employee as defined by Section 2(3) of the Act.

Said Section in part defines an employee as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations and any harbor worker including a ship repairman, ship builder or ship breaker" . . . .

It is obvious from its decision that the Board concluded that the respondent was a longshoreman.

To determine if such conclusion was legally valid it is necessary to establish just what a longshoreman is. In order to do that an examination of the terms "maritime employment" and "longshoring operations" is mandated.

"Maritime employment" means employment related to the navigation and operation of a vessel. The term is not sufficiently elastic to encompass the respondent whose duties in this instance were to remove cargo from within the confines of a truck; which cargo had been off loaded from a vessel some weeks before at a remote geographical location, and to deposit such cargo at the entrance to a terminal warehouse.

There is, under the circumstances, no direct relation to a vessel engaged in trade commerce or travel on navigable waters.

> *Massman Construction Co.* v. *Bassett,* 30 F. Supp. 813 (E.D. Mo. 1940).

Nor did respondent's work entail the management of a vessel, loading thereof, care of its equipment and cargo and performance of any task essential to accomplish its purpose on navigable waters.

> *Beasley* v. *O'Hearne,* 250 F. Supp. 49, 53 (S.D. West Va. 1966).

Any evaluation of the term "longshoring operations" must of necessity have recourse to the definition of such as appears in the Department of Labor Safety and Health Regulation for Longshoring.

> 29 CFR 1504.3 (1).
>
> "(1) The term 'longshoring operation' means the loading, unloading, moving or handling of cargo, ship's stores, gear, etc., into, in or out of any vessel on the navigable waters of the United States."

A substantially similar definition appears in 29 CFR: 1910.16 (B)(1) Occupational and Safety Health Standards. Respondent Spataro, given the undisputed facts of the instant case, does not so qualify.

In addition the Board's decision is of necessity grounded upon its interpretation of Sec. 3(A) of the Act.

This Section provides for payment of compensation for death or disability only in the event that either results from an injury occurring upon the navigable waters of the United States, including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other

adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel.

It can be readily seen therefore that the 1972 amendments prescribe a dual test before Federal jurisdiction may be invoked.

The term "navigable waters" has been extended to include certain land areas upon which specific operations of an employer take place.

A claimant under the Act, as a condition precedent to recovery, must be in maritime employment.

As the Court of Appeals Fourth Circuit pointed out in a recent but not yet reported case:

I.T.O. Corp. of Baltimore, Employer

and

Liberty Mutual Insurance Co., Carrier

Petitioners

v.

William T. Adkins et al.

Respondents

> "The net effect of the 1972 amendments was therefore to broaden the area in which an injury would be covered and narrow the class of persons eligible according to job function."

On this record it cannot be said that Respondent Spataro has met the situs requirement. The Marra Bros. Terminal was used as a storage facility for cargo off loaded at other locations. There had been no unloading of vessels for about one half year.

The Board has seemingly given little or no consideration to the intent of the Congress concerning those individuals whose injuries would be encompassed by the 1972 amendments.

"The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by the Act for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area.

The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing or building a vessel just because they are injured in an area adjoining navigable waters used for such activity. Thus employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo."

S. Rep. No. 92-1125 Congress 2nd Sess. 1972
H.R. Rep. No. 92-1441-92 Cong. 2nd Sess. 1972
3 U.S. Code Cong. and Adm. News 4698-4707-08
(92 Cong. 2nd Sess. 1972)

There can be no more accurate description of Respondent Spataro's work on the day in question but that used to illustrate those excluded from coverage.

In *Adkins* (*supra*) the Court utilized the so called "point of rest" theory.

In essence it held coverage under the Act is available to those who are injured while engaged in unloading work activity between the ship and the first storage or holding area on the pier, wharf or terminal adjoining navigable waters, and to those injured while loading, coverage is afforded from the last storage area, pier, etc., to the ship.

In the instant case the record is devoid of any such work activity.

CONCLUSION

The decision and Order of the Benefits Review Board should be reversed and the claim dismissed with costs to Petitioner.

Dated: January 26, 1976.

Respectfully submitted,

JOSEPH F. MANES
Attorney for Petitioners

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PITTSTON STEVEDORING CORPORATION and HOME INSURANCE COMPANY,

Petitioners,

against

FRANK SPATARO,

Respondent,

and

DIRECTOR, OFFICE OF WORKMEN'S COMPENSATION PROGRAMS UNITED STATES DEPARTMENT OF LABOR,

Respondent.

ON APPEAL FROM AN ORDER OF THE BENEFITS REVIEW BOARD U.S.D.L.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Rose Rinella, being duly sworn, deposes and says that she is over the age of 18 years, is not a party to the action, and resides at 951 E. 17th Street, Brooklyn, New York, 11230

That on January 28, 1976, she served 1 copies of Appendix and 2 copies of Brief for Petitioners

PAUL A. GRITZ, ESQ.,
Attorney for Respondent,
185 Montague Street
Brooklyn, New York 11201

Miss LAURIE M. STREETER,
Associate Solicitor
U. S. Department of Labor
Room N-2716
3rd and Constitution Ave., N.W.
Washington, D. C. 20210

by depositing the same, properly enclosed in a securely-sealed, post-paid wrapper, in a Branch Post Office regularly maintained by the United States Government at 350 Canal Street, Borough of Manhattan, City of New York, addressed as above shown.

.....

Sworn to before me this
28th day of January, 1976

JOHN V. D'ESPOSITO
Notary Public, State of New York
No. 30-0592960
Qualified in Nassau County
Commission Expires March 30, 1977